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7 The Honorable James Robart

8 **UNITED STATES DISTRICT COURT**
9 **WESTERN DISTRICT OF WASHINGTON**
10 **AT SEATTLE**

11 DWIGHT HOLLAND,

12 Plaintiff,

13 v.

14 OFFICER WSP ANTHONY BROCK in
his individual and official capacity as
Washington State Patrol officer,

15 Defendant.

16 NO. 12-cv-0791 JLR

17 DEFENDANT WASHINGTON
18 STATE PATROL ANTHONY
19 BROCK'S TRIAL BRIEF

20 **I. INTRODUCTION**

21 Defendant Washington State Patrol Trooper Anthony Brock (defendant or "Trooper
22 Brock") respectfully submits the following summary of the legal and factual issues remaining
23 for the January 21, 2014 trial of this case.

24 **II. STATEMENT OF THE CASE**

25 This case arises from a straight-forward DUI arrest of *pro se* plaintiff Mr. Holland
26 ("Holland"). He exhibited multiple indicators of intoxication, refused the Field Sobriety Test,
and refused the Breath Test. Holland claims he was arrested for "driving while black" – not
because of DUI. In his complaint, he seeks \$2.5 million dollars.

The arrest and transport of Holland was audio and video recorded by Trooper Brock's
in-car video camera. Early Friday morning, on September 16, 2011 at approximately

1 1:32 a.m., Trooper Brock was parked just south of the 1st Avenue Bridge (on the left shoulder
 2 of southbound SR-509). He was working speed enforcement in a marked patrol vehicle.
 3 Trooper Brock observed a pickup truck crossing over the bridge, approaching his vehicle from
 4 the rear. Trooper Brock's Radar clocked this vehicle traveling 58 mph in a 45 mph zone. This
 5 was the only vehicle approaching Trooper Brock at the time his Radar clocked this speed.
 6 Trooper Brock activated his patrol vehicle's emergency lights and proceeded to pull over the
 7 pickup truck. The driver was later identified as Holland.

8 As can be seen on the video, Trooper Brock contacted the vehicle on the driver's side.
 9 Trooper Brock did not stop Holland because Holland was "driving while black," as he alleges.
 10 Trooper Brock stopped Holland because he was speeding. In fact, Trooper Brock was not
 11 aware of Holland's race or ethnicity until he was at his driver's side window.

12 The driver (Holland) rolled down the driver's window approximately one-half inch.
 13 Holland attempted to talk with Trooper Brock with his head turned away from Trooper Brock.
 14 As can be heard on the video, Trooper Brock used a very professional, polite tone with
 15 Holland. He explained he clocked him going 58 mph in a 45 mph zone. Trooper Brock asked
 16 Holland to roll down the window because he could not hear him. (In the video, the loud
 17 background noise of passing cars can be heard.) Holland rolled the window down another half
 18 inch, but would not roll it down any further. Through the opening in the window, Trooper
 19 Brock smelled an obvious odor of alcohol coming from inside the vehicle. Holland stated he
 20 was coming from a friend's house. (This statement was not accurate. At his deposition, he
 21 testified he left his girlfriend's house in Auburn and traveled to Alki Point in Seattle because
 22 he "love[d] the water". En route from Alki Point for his home in Renton he was stopped.)
 23 Trooper Brock observed that Holland's eyes were very red, bloodshot and droopy. Trooper
 24 Brock asked Holland to exit the vehicle.

25 Once Holland was outside of his vehicle, Trooper Brock asked him how much alcohol
 26 he had to drink that night. Holland responded: "I'm pleading the 5th, Sir." Trooper Brock

1 asked him if he would do some voluntary field sobriety tests. Holland responded: "I'm
 2 pleading the 5th, Sir." Trooper Brock explained to him that he wanted to make sure that
 3 Holland was "OK" to drive. Trooper Brock repeatedly asked him if he wanted to perform the
 4 tests, and each time Holland refused to say "yes" or "no"; he just stated he pleaded the 5th and
 5 did not want to incriminate himself. He refused to participate in any field sobriety tests.

6 While talking with Holland, Trooper Brock smelled alcohol on his breath. As Holland
 7 stood in front of Trooper Brock at the front of Holland's truck, Holland had a constant sway
 8 and repeatedly reached back and used the front of his truck for balance. After considering all
 9 of the above indicators, Trooper Brock formed the opinion that Holland was under the
 10 influence of intoxicants and unable to operate a motor vehicle safely. Holland was placed
 11 under arrest for suspicion of driving under the influence ("DUI").

12 Prior to placing Holland in the backseat of his patrol vehicle, Trooper Brock
 13 handcuffed Holland. As Holland has wide shoulders, Trooper Brock combined two sets of
 14 handcuffs to make them longer in length and seated him in the backseat. After being in
 15 handcuffs for less than 2 ½ minutes, he complained they were too tight. 40 seconds after he
 16 complained Trooper Brock helped him out of the patrol car and adjusted them. He explained
 17 why they were binding – which was due to Holland turning his wrists. This entire exchange
 18 took about two and a half minutes. Holland never again mentioned any handcuff discomfort to
 19 Trooper Brock. The entire transport from the scene to the police station was video and audio
 20 recorded, and Holland never mentioned any discomfort. Holland's King County Jail records
 21 show he did not make any complaints about pain, discomfort, or any injuries from the
 22 handcuffs.

23 Trooper Brock read Holland his Miranda warnings and asked him if he understood
 24 them. Holland responded: "No, I do not and I'm not giving up my rights. I'm reserving my
 25 rights under UCCC 1-308." Trooper Brock advised Holland that he was not asking him to give
 26

1 up his rights, but was asking him if he understood them. Holland responded: "I'm reserving
 2 my rights. I'm waiving my benefits and privileges under UCC 1-08."

3 Trooper Brock transported Holland to the Tukwila Police Department. Holland's
 4 transport was also video recorded, with the camera facing Holland. Like the arrest footage, the
 5 transport footage shows the transport was uneventful. During this transport, the patrol car was
 6 filled with the smell of intoxicants from Holland.

7 At the Tukwila Police Department, Trooper Brock read Holland his Miranda warnings
 8 again, as well as the "Implied Consent Warning for Breath" test. Holland repeatedly stated he
 9 pled the 5th and was not going to do anything to incriminate himself. Trooper Brock asked
 10 Holland if he would submit to a breath test. Holland responded: "I'm not going to do anything
 11 to incriminate myself." Trooper Brock patiently advised Holland that this was a "yes" or "no"
 12 question and that if he did not give an answer then Trooper Brock would assume that he
 13 refused. Holland responded that this was a trick question, and that he was not going to do
 14 anything to incriminate himself. Trooper Brock took these responses as a refusal to submit to
 15 the breath test and processed him as a refusal. Accordingly, his driving privileges were
 16 revoked for one year effective November 16, 2011.

17 At no point in time did Trooper Brock use any derogatory language or racial slurs
 18 against Holland. At all times, Trooper Brock was polite and professional with Holland, as
 19 evidenced on the audio and video recording.

20 Following his arrest, Holland was charged with DUI. The King County District Court
 21 made a "Finding of Probable Cause" on January 9, 2012: Specifically, the court found:

22 After a careful review of the files and records herein including the
 23 statement of probable cause executed by the citing law enforcement
 24 officer along with any report submitted by that officer and any
 accompanying documentation to that report.

25 **THE COURT HEREBY FINDS PROBABLE CAUSE EXISTS that on**
 09/16/2011 the crime of DUI may have been committed.

1 The DUI charge in the criminal proceeding was dismissed because the State was “unable to
 2 prove the charges beyond a reasonable doubt”. Trooper Brock provided no testimony in this
 3 matter, and he was not contacted with regard to this criminal proceeding.

4 Holland has failed to take steps to mitigate his damages, if any. He has never sought
 5 treatment for his alleged emotional distress. Nor has he identified any expert to opine on this
 6 subject. He sought treatment one time for his right wrist; this was two weeks after this
 7 incident. Finally, years after this arrest, his driving privileges have not been restored because
 8 he has not provided DOL with financial responsibility insurance for the future (an SR 22
 9 Insurance Filing), or passed all required tests.

10 **III. ISSUES FOR TRIAL**

11 The court found as a matter of law that “Trooper Brock had reasonable, articulable
 12 suspicion to stop Mr. Holland on an investigatory traffic stop for speeding . . .”¹ As stated in
 13 the parties’ agreed PreTrial Order,² the following narrow issues remain for trial:

14 1. Did Trooper Brock have probable cause to arrest plaintiff under the Fourth Amendment?
 15 2. Was Trooper Brock’s use of “force” in handcuffing plaintiff reasonable under the
 16 circumstances?
 17 3. Is Trooper Brock entitled to qualified immunity?

18 This case distills down to two issues: whether Trooper Brock had probable cause to
 19 arrest Holland, and whether the “force” from handcuffing was reasonable. The parties’ Joint
 20 Jury Instruction (“Joint Instruction”) No. 2 provides a summary of these claims.

21 **A. Reasonable Suspicion Established**

22 Because the Court found that Trooper Brock had “reasonable, articulable suspicion to
 23 stop Mr. Holland,”³ the jury should so be instructed. Thus, Joint Instruction No. 20 instructs
 24 the jury that Trooper Brock had lawful grounds to conduct a traffic stop of Holland.

25 ¹ ECF No. 42, p. 25:9-12.

26 ² ECF No. 84, p. 3.

³ ECF No. 42, p. 25:9-12.

1 The jury need not be instructed on reasonable suspicion to conduct a voluntary field
 2 sobriety test for several reasons. First, it is undisputed no field sobriety test was conducted;
 3 Holland refused. Second, the crux of this case is whether there was probable cause to arrest.
 4 Whether probable cause existed to arrest for DUI necessarily subsumes the much lessened
 5 standard of whether reasonable suspicion existed to conduct a field sobriety test. Third, the
 6 parties agree this is not an issue for the jury. At issue is probable cause for his arrest.

7 **B. Probable Cause to Arrest for DUI**

8 The crux of this case is whether probable cause existed to arrest Holland for DUI.
 9 Trooper Brock contends he had probable cause to arrest. Accordingly, Joint Instruction No. 21
 10 follows the 9th Circuit Model Instruction 9.20 (probable cause) and identifies the elements of
 11 DUI (RCW 46.61.502).

12 Joint Instruction No. 22 informs the jury when probable cause exists to arrest a suspect
 13 for DUI. *See Wilder v. Turner*, 490 F.3d 810, 815 (10th Cir. 2007)(holding that the officer,
 14 who observed several indicators of excessive alcohol consumption, had probable cause to
 15 arrest driver); *Miller v. Harget*, 458 F.3d 1251, 1260 (11th Cir. 2006)(holding that motorist's
 16 refusal to take a Breathalyzer test, coupled with the smell of alcohol from the vehicle, gave the
 17 officer probable cause to arrest motorist). This is consistent with *Summers v. State of Utah*,
 18 927 F.2d 1165 (10th Cir.1991), in which the Tenth Circuit wrote: "The undisputed facts
 19 regarding plaintiff's operation of his vehicle, the officer's scent of alcohol emanating from the
 20 vehicle and plaintiff's refusal to take a field sobriety test substantiate the . . . conclusion" that
 21 the officer had probable cause. *Id.* at 1166.

22 So that the jury is clear that probable cause does not require proof beyond a reasonable
 23 doubt, the parties propose Joint Instruction No. 23. *Maryland v. Pringle*, 540 U.S. 366, 371,
 24 (2003); *Illinois v. Gates*, 462 U.S. 213, 235 (1983) ("Finely tuned standards such as proof
 25 beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have
 26 no place in the [probable-cause] decision").

1 In Washington State, by statute, those who drive vehicles have given consent to have
 2 their breath tested for alcohol concentration. If a driver refuses, the driver's license is revoked
 3 for one year by statute. *See* RCW 46.61.502; RCW 46.20.308; RCW 46.20.3101. Here,
 4 Holland refused the breath test and his license was revoked for one year. So the jury
 5 understands this is governed by state statute – and not at the discretion of Trooper Brock – the
 6 parties propose Joint Instruction No. 24.

7 Throughout this incident, Holland asserted his Fifth Amendment privilege. To ensure
 8 that the jury understands that this privilege does not apply to Field Sobriety Tests or to Breath
 9 Tests, Joint Instruction No. 25 should be given. These tests are non-testimonial, and therefore
 10 are not subject to the Fifth Amendment. Accordingly, suspects may not refuse these tests on
 11 the grounds of their Fifth Amendment privilege. Likewise, *Miranda* warnings do not need to
 12 be given prior to such tests. *Heinemann v. Whitman County*, 105 Wn.2d 796 (1986); *Mercer*
 13 *Island v. Walker*, 76 WN.2d 607 (1969); *City of Seattle v. Stalsbroten*, 138 Wn.2d 227, 978
 14 P.2d 1059 (1999); *State v. Moore*, 79 Wn.2d 51, 56-57, 483 P.2d 630 (1971). This instruction
 15 is imperative to avoid confusion by the jury over what Trooper Brock could or could not do
 16 after Holland asserted his Fifth Amendment privilege. Without this instruction, the jury may
 17 question whether Trooper Brock could ask if Holland would perform a Field Sobriety Test or
 18 submit to a Breath Test, and do so without providing *Miranda* warnings. That is not at issue in
 19 this case. This jury instruction provides that necessary clarification.

20 Finally, Holland's state of intoxication cannot be used as an excuse for his behavior. In
 21 Washington no act committed by a person while in a state of voluntary intoxication shall be
 22 deemed less criminal by reason of his condition. RCW 9A.16.090. Accordingly, the jury
 23 should be provided the parties' Joint Instruction No. 31 on this point. The defendant has ample
 24 evidence to show Holland was DUI.

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1 **C. Whether the Force Used from Handcuffing was Reasonable**

2 Here, Holland's "excessive force" claim is based on his allegation that his handcuffs
 3 were too tight. The undisputed evidence is that after Holland had been handcuffed for less
 4 than 2 ½ minutes, he complained they were too tight. 40 seconds later Trooper Brock removed
 5 him from the patrol car and proceeded to adjusted them. Holland never again mentioned any
 6 handcuff discomfort to Trooper Brock.

7 In this case, there is no evidence that would permit the jury to conclude that Trooper
 8 Brock applied unreasonable force in handcuffing Holland. Alternatively, even if some degree
 9 of force used in tightly handcuffing Holland was deemed to be excessive, a reasonable officer
 10 could have thought the "force" was needed, entitling Trooper Brock to qualified immunity.
 11 *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001), *overruled on other grounds* by *Pearson v.*
 12 *Callahan*, 129 S.Ct. 808 (2009).

13 Regarding the reasonableness of that force, the parties propose the 9th Circuit Model
 14 Instruction No. 9.22 (excessive force) be used (Joint Instruction No. 28).

15 So the jury understands that merely being placed in handcuffs and transported to the
 16 police station is not excessive force but standard practice, Defendant Trooper Brock's Disputed
 17 Instruction No. 29 should be given. "Merely being handcuffed and taken to the police
 18 station . . . is not excessive force, but standard police practice." *Davenport v. Rodriguez*, 147
 19 F. Supp. 2d 630, 637 (S.D. Texas 2001). "Handcuffing an arrestee is standard practice,
 20 everywhere." *LaLonde v. Cnty. of Riverside*, 204 F.3d 947, 964 (9th Cir. 2000).

21 Finally, Washington courts have long held that a police officer has the duty to enforce
 22 all laws and ordinances within his or her jurisdiction and to take reasonable corrective action to
 23 prevent or stop a violation where he or she has actual knowledge of a violation. *Bailey v.*
 24 *Forks*, 737 P.2d 1257 (Wash. 1987). Trooper Holland was not obliged to ignore criminal law
 25 violations. Accordingly, Joint Instruction No. 26 is proposed.

D. Qualified Immunity

Joint Instruction No. 27 provides the standard for qualified immunity. The Court earlier determined that certain factual disputes prohibited a finding of qualified immunity for Trooper Brock. The defendant believes that should Holland fail to adduce contradictory facts in his case in chief, or if the jury resolves the disputed facts in the defendant's favor by response to special interrogatories, the Court must revisit the qualified immunity question and dismiss Trooper Brock. If the Court deems the qualified immunity issue too intertwined with the factual and legal considerations underpinning Holland's claims, however, the defendant respectfully urges the Court to instruct the jurors on the proper standard for their determination on the issue. Absent such precaution the defendant could be deprived of a significant right and defense solely due to "facts" fabricated specifically for that purpose.

E. Mitigation of Damages

13 Finally, at trial evidence will be presented that Holland has failed to mitigate his
14 damages, if any. The parties propose 9th Circuit Model Instruction No. 5.3 on mitigation
15 (Joint Instruction No. 33).

16 This case is straightforward and should be presented to the jury in that fashion.
17 Practically speaking, they need only determine two issues – whether Trooper Brock had
18 probable cause to arrest and whether the force used in handcuffing Holland was reasonable.

DATED this 13th day of January, 2014.

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CERTIFICATION OF SERVICE

I hereby certify that on this 13th day of January, 2014, I caused to be electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to:

Dwight Holland: dmanh3@comcast.net

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